U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0359 BLA

LOWELL T. BISE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 05/13/2016
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Lowell T. Bise, Honaker, Virginia, *pro se.*

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (11-BLA-5294) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits on a

[1] Cindy Viers, a benefits counselor with Stone Mountain Health Services of

claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on March 16, 2010.

After crediting claimant with at least thirty-four years of underground coal mine employment,[2] the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge further found that the evidence did not establish that the claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because claimant failed to establish that he is totally disabled, the administrative law judge found that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that claimant was not entitled to benefits pursuant to 20 C.F.R. Part 718. The administrative law judge, therefore, denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated

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Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Viers is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the total disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

SECTION 411(c)(3) PRESUMPTION – COMPLICATED PNEUMOCONIOSIS

Under Section 411(c)(3), 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which: (A) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-1143, 1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

Section 718.304(a) – X-Ray Evidence

The administrative law judge initially addressed whether the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). The administrative law judge considered twelve interpretations of seven x-rays taken on March 16, 2005, March 3, 2008, February 1, 2010, April 20, 2010, August 30, 2010, January 30, 2012, and January 8, 2013.

The administrative law judge correctly noted that only one of the seven x-rays, the February 1, 2010 film, was interpreted as positive for complicated pneumoconiosis, by Dr. Alexander, a B reader and Board-certified radiologist. Decision and Order at 9-10; Director's Exhibit 14. However, three equally qualified physicians, Drs. Miller, Wiot, and Meyer, interpreted the x-ray as negative for complicated pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibits 5, 34.

In weighing the conflicting interpretations of the February 1, 2010 x-ray, the administrative law judge found that Dr. Alexander's positive interpretation "suffer[ed] a loss of probative value" because the doctor could not exclude the possibility that the large right upper-lung opacity that he identified as complicated pneumoconiosis could also be lung cancer or a calcified granuloma. Decision and Order at 10; Director's Exhibit 14. Moreover, because a preponderance of the dually qualified physicians interpreted the February 1, 2010 x-ray as negative for complicated pneumoconiosis, the administrative law judge found that the x-ray was negative for complicated pneumoconiosis. Decision and Order at 9-10.

In rendering this finding, the administrative law judge acted within his discretion in discounting Dr. Alexander's interpretation of the February 1, 2010 x-ray as equivocal. *See Melnick*, 16 BLR at 1-37; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). Moreover, because a majority of dually qualified physicians interpreted the February 1, 2010 x-ray as negative for complicated pneumoconiosis, the administrative law judge permissibly found that this x-ray is negative for complicated pneumoconiosis. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence does not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Section 718.304(c) – Other Evidence

The record also contains digital x-ray evidence supportive of a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).[4] Specifically, Dr. Alexander interpreted a March 22, 2011 digital x-ray as positive for complicated pneumoconiosis.[5] Claimant's Exhibit 4. The administrative law judge, however, permissibly discounted Dr. Alexander's positive interpretation of this digital x-ray as equivocal, noting that the doctor acknowledged that the large right upper-lung opacity that he identified as complicated pneumoconiosis could also be lung cancer or a calcified granuloma. *See Melnick*, 16 BLR at 1-37; Decision and Order at 11; Claimant's Exhibit 4. The administrative law judge, therefore, permissibly found that the March 22, 2011 digital x-ray does not support a finding of complicated pneumoconiosis. Because there is no other medical evidence supportive of a finding of complicated pneumoconiosis, we

[4] Because there is no biopsy evidence in the record, there was no evidence to consider pursuant to 20 C.F.R. §718.304(b).

[5] Dr. Castle, a B reader, interpreted the March 22, 2011 digital x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 27.

affirm the administrative law judge's determination that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

The administrative law judge considered all of the relevant evidence on the issue of complicated pneumoconiosis, and substantial evidence supports his determination that claimant did not establish invocation of the irrebuttable presumption set forth at 20 C.F.R. §718.304. That determination is, therefore, affirmed.

TOTAL DISABILITY

In evaluating whether claimant established a totally disabling pulmonary or respiratory impairment, the administrative law judge correctly noted that all of the pulmonary function studies of record, namely the twenty-one studies conducted between December 8, 2001 and October 11, 2012, are non-qualifying.[6] Decision and Order at 16; Director's Exhibits 12, 23; Claimant's Exhibit 9; Employer's Exhibits 14-27, 31, 35, 36, 38. The administrative law judge also correctly noted that the two arterial blood gas studies of record conducted on April 20, 2010 and March 22, 2011 are non-qualifying. Decision and Order at 16; Director's Exhibit 12; Employer's Exhibit 27. Consequently, we affirm the administrative law judge's findings that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii).

Because there is no evidence of record indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 14.

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge correctly found that "no physician opined that [claimant] had a totally disabling pulmonary or respiratory impairment."[7] Decision and Order at 16. We, therefore, affirm the administrative law

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] Drs. Al-Khasawneh, Castle, and Hippensteel addressed claimant's pulmonary function. Dr. Al-Khasawneh opined that claimant "has normal pulmonary capacity with no impairment." Director's Exhibit 12. Dr. Castle opined that claimant "does not demonstrate any evidence of a respiratory impairment from any cause . . . ." Employer's Exhibit 44. Dr. Hippensteel opined that claimant "retains the pulmonary capacity to work at his prior job in the mines." Employer's Exhibit 45.

judge's finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because the medical evidence of record does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In light of that affirmance, we also affirm the administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305; Decision and Order at 17.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge